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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 212

MASS COMMUNICATORS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B 1–8) is not yet reported. The orders of the Federal Communications Commission (R. 25, 67–68) have not been reported, and its decision denying reconsideration (R. 58–66) is unofficially reported at 17 Pike & Fischer, Radio Regulation 572.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1959 (Pet. App. A). The petition for a writ of certiorari was filed on July 15, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

QUESTIONS PRESENTED

The Federal Communications Commission reinstated a construction permit for a new radio station which had inadvertently been allowed to expire prior to completion of construction, though a new application to use the frequency in the community had been filed in the interim and questions as to the permittee's qualifications to be a broadcast licensee had been raised. The questions presented are:

1. Whether the Commission had authority to reinstate the permit where completion of construction within the time originally prescribed was not prevented by causes not under the control of the permittee.

2. Whether the Commission could properly refuse to give the new application comparative consideration with the application to replace the expired permit.

3. Whether the Commission could properly grant the replacement application while holding the questions relating to the permittee's qualifications in abeyance for subsequent consideration in a hearing ordered upon permittee's application for a license.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*) are set forth in Appendix C to the petition. Section 319(c) of that Act, 47 U.S.C. 319(c), which is partially quoted in Appendix C, reads as follows:

> Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon if being

made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. * * *

STATEMENT

This case concerns an appeal from Federal Communications Commission actions granting an application by a permittee of a standard broadcast station to reinstate an expired construction permit, and returning, without hearing, petitioner's application for the same facilities on the ground that the frequency sought was not "available" for assignment. The relevant facts are as follows:

On March 20, 1957, the Commission granted the application of Mrs. Jane A. Roberts for a construction permit for a new standard broadcast station at Cedar Falls, Iowa (R. 1–4). The construction permit specified November 20, 1957, as the date for completion of construction (R 2). By the specified date, Mrs. Roberts had not quite completed the construction, nor had she filed an application on FCC Form 701 for additional time to complete construction, as provided by Section 319(b) of the Communications Act and Section 1.323(a) of the Commission Rules. As a consequence, Mrs. Roberts' construction permit

expired in accordance with its terms on November 20, 1957.[1]

On December 13, 1957, the petitioner, pursuant to Section 308 of the Communications Act, submitted an application for a construction permit for a new standard broadcast station requesting the same facilities authorized to Mrs. Roberts (R. 59). On December 23, 1957, four days after being advised by the Commission that her permit had expired, Mrs. Roberts filed an application on FCC Form 321 for a construction permit to replace her expired permit (R. 10–13). The petitioner, on January 3, 1958, filed a letter with the Commission which raised, *inter alia,* questions as to Mrs. Roberts' qualifications to be a licensee (R. 16–23).

On January 17, 1958, the Commission found that, although Mrs. Roberts had not been prevented from completing construction by causes beyond her control, she nevertheless displayed reasonable diligence in carrying on the construction, and that construction of her station had, in fact, been substantially completed by November 20, 1957, the date specified by the Commis-

[1] Mrs. Roberts had secured a modification of her permit on July 5, 1957, to change transmitter type and studio and transmitter location (R. 9). Contrary to her belief, however, the modified permit did not extend the original period for construction, but instead specified the original date, by reference (R. 10). The Commission was also originally unaware that Mrs. Roberts' permit had expired, and consequently, on December 12, 1957, granted her authority, requested the previous day (R. 69), to conduct equipment tests of the nearly-completed station (R. 70). This authority was subsequently canceled on December 19, 1957, after the Commission became aware that her permit had expired (R. 59).

sion for completion. Accordingly, the Commission granted Mrs. Roberts' application for a construction permit to replace her expired permit (R. 26–29).[2] Simultaneously, it returned, without hearing, the petitioner's application for a construction permit for the same facilities (R. 67–68).

Petitioner then filed a petition for reconsideration of the Commission actions and again tendered its application for the identical facilities previously authorized to Mrs. Roberts (R. 37–54). In its petition for reconsideration, petitioner urged that under the terms of Section 319(b) of the Communications Act, there had been an automatic forfeiture of Mrs. Roberts' construction permit on the date of its expiration, and that therefore the Commission had before it two conflicting and mutually exclusive applications, upon which it was required, under *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327, to hold a comparative hearing. The Commission denied reconsideration and reaffirmed its actions in a Memorandum Opinion and Order released on July 21, 1958 (R. 58–66). In this Memorandum Opinion, the Commission pointed out that the questions raised by petitioner as to Mrs. Roberts' qualifications were

[2] At the same time, the Commission, by letter, requested a statement from Mrs. Roberts concerning the matters raised in petitioner's letter of January 3, 1958, and stated that its grant of her application for replacement of expired permit was without prejudice to whatever action it might take as a result of this inquiry into her qualifications to be a licensee (R. 25). After study of Mrs. Roberts' reply (R. 31–36), the Commission determined that her application for license must be designated for hearing (R. 57–58); the hearing (FCC Docket No. 12597) is now in progress. See footnote 3, *infra*, p. 9.

to be considered in connection with its action on her pending application for a license (see footnote 2, *supra*).

On appeal, the Court of Appeals (Judge Miller dissenting, without opinion) affirmed the Commission's actions (Pet. App. B 1–8). The court upheld the Commission's determination that, under the provisions of Section 319(b) of the Act, the expiration of a permit does not constitute an automatic forfeiture of the permit; and that only if the Commission does not exercise its discretion, either by extension or replacement of the permit, does such a forfeiture occur (Pet. App. B. 6). The court stated (Pet. App. B 7): "One of the major purposes of the section is to allow the Commission to exercise its discretion before an automatic forfeiture takes place." It concluded (*ibid.*): "Under the circumstances of the present case, where the Commission's discretion has been exercised to prevent a forfeiture, there can be no basis for applying the *Ashbacker* doctrine." It also held that the Commission had not exceeded its powers, or abused its discretion, in postponing the questions raised as to the permittee's fitness until the holding of the hearing on her application for a license (Pet. App. B 7–8).

ARGUMENT

The questions raised by the petition present narrow issues of statutory interpretation which were decided correctly below and are of no general importance; they do not warrant further review by this Court.

1. The basic holding of the Court of Appeals is that where the causes for delay in construction are within

the control of the grantee, Section 319(b) of the Communications Act confers upon the Commission discretionary power in its consideration of requests for granting further time for construction. Thus, "automatic forfeiture", within the meaning of the Section, occurs only if the Commission does not exercise its discretion in extending the time for construction, by granting either an application for extension of the original permit or an application, filed within a reasonable period after expiration, for a new permit to replace the expired permit.

Petitioner's contention (Pet. 6) that the Court of Appeals' opinion would result in confusion in the administration of the Communications Act is without any merit. As the court found (Pet. App. B. 4–6), the Commission's uniform interpretation of the Section, followed in this case, is entirely consistent with the statutory scheme. If the Commission finds that delay in completion of construction is attributable to "causes not under the control of the grantee", it cannot declare the permit forfeited (Pet. App. B. 3–4). If, however, the causes for delay are under the control of the grantee, the Commission is still authorized to "allow further time" for construction as in its discretion seems reasonable under the circumstances, and nothing in the language of the Section purports to limit the Commission's exercise of this discretion to cases where the permittee applies for further time in advance of the permit's expiration date (Pet. App. B. 4, 6). The statute, in other words, provides an appropriately flexible mechanism for Commission evaluation of the varying factual circum-

stances which may or may not justify further extension of the station's completion date. We submit, therefore, that the court below correctly affirmed the "longstanding and consistent administrative interpretation" (*United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396) of the agency charged with administering the Act (see Pet. App. B 4–5, for citation of prior Commission decisions).

2. Petitioner's further contention (Pet. 7–8) that, even if the Commission possesses discretionary power to prevent the forfeiture of an expired permit, the decision below abrogates the petitioner's rights to a comparative hearing under *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327, is clearly unsound. As the court below properly held, "Since no automatic forfeiture occurs unless and until the Commission has exercised its discretion, the *Ashbacker* doctrine has never been applied to a Section 319(b) application" (Pet. App. B 6). This is because the frequency is not "available," for new applications in the *Ashbacker* sense, during the pendency of a Commission determination relating to the permit, nor does the frequency become "available" until either the abandonment of the permit by the original permittee or a valid denial by the Commission, in its discretion, of an application for extension or replacement of the permit (Pet. App. B 6–7).

3. Petitioner's final contention (Pet. 8–9), that the court below erroneously sustained the Commission's action in granting a replacement application without first disposing of petitioner's charges bearing upon Mrs. Roberts' qualifications to be a broadcast licensee,

is equally without merit. As the court noted, unlike Section 319(b) which relates solely to extensions of time to complete construction, Section 319(c) (see pp. 2–3, *supra*), governing the subsequent grant of licenses to operate broadcast stations, expressly provides for consideration at that time of matters coming to the Commission's attention which might make the grant of a license contrary to the public interest. The court was thus clearly correct in holding (Pet. App. B 7–8) that the Commission had not exceeded its powers or abused its discretion in deferring consideration of these qualification questions to the proceeding on Mrs. Roberts' license application.[3]

[3] As petitioner points out (Pet. 4, n. 6), the Commission has in fact designated Mrs. Roberts' license application for hearing on these qualification questions, and an examiner has issued an Initial Decision looking toward the denial of license (*In re Application of Jane A. Roberts (KCFI) for Station License*, Docket No. 12597, FCC 59D-55, issued May 28, 1959). Such action, if subsequently affirmed by the Commission and the courts, would moot the present action.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
ROBERT A. BICKS,
Acting Assistant Attorney General.
RICHARD A. SOLOMON,
Attorney.

EDGAR W. HOLTZ,
Acting General Counsel,
MAX D. PAGLIN,
Assistant General Counsel,
RICHARD M. ZWOLINSKI,
Counsel,
Federal Communications Commission.

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